were both entered on February 11, 2005. This *pendente lite* Order denying the Father joint legal and joint physical custody of his child, was appealable under Rule 2-602 and Code, Courts Art., Sections 12-301 and 12-303.

Despite the fact that the parties lived only 15-20 minutes away from each other, and despite the fact that neither party asserted that the other party was "unfit," (indeed, the Mother acknowledged that the Father loves the child very much and said that if she died, she would want the Father to have Custody), the trial judge did not even consider joint physical custody as an option, stating "I just don't think that's what they need at that age." --Despite the fact that she (the judge) concluded that "I don't have any concerns about how she's [the child] is taken care of in either household."

This is an appeal of a *pendente lite* child custody decision awarding temporary sole legal and sole physical custody to Defendant-Mother based on the judge's stated general belief that joint physical custody would not be good for a child in first grade (saying "I just don't think that's what they need at that age"), and denied him joint legal custody due to his "not being able to let go of his wife" as concluded from his incessant phone calls made approximately three years before the trial date in the year 2002, allegations from the years 2000 - 2001, and because he moved closer to Defendant-Mother to be closer to the parties' child, and because she had been the "primary caregiver."

The judgment being appealed resulted from a *pendente lite* hearing and oral Order in the Circuit Court for Frederick County, Maryland, on January 4, 2005. The Order

granting temporary sole legal and sole physical custody to Defendant-Mother and the Order denying Plaintiff-Father's Motion To Alter Or Amend Judgment were both entered by the court on February 11, 2005.

The September 30, 2005 Unreported Opinion of the Court of Special Appeals of Maryland in Case No 2831 affirmed the Judgment of the Circuit Court, and the Mandate was issued on October 17, 2005. The Petition for *Writ of Certiorari* to the Court of Appeals of Maryland was denied on December 21, 2005.

The Circuit Court trial judge issued an Order and Opinion for this matter on January 4, 2005 (*See* transcription of oral Opinion on pp. A-18--A-30 of Appendix of Appellant's Brief filed in the Maryland Court of Special Appeals for this case) stating in part:

(E-210 [T. 141, Lines 7-])

7 in other words, I don't think it's a good idea to put a first
8 grader fifty percent in one home and fifty percent in another
9 home. I just don't think that's what they need at that
10 age

Plaintiff-Father, is retired from the military and currently working as a contract specialist for the Department of Defense. He has an Associate's Degree in liberal arts and

a Bachelor's Degree in Business Management (E-2 [T. Lines 28, 5 - 77]). Mr. Grabill stated that he "found a very good job that is very professional and it allows me some flexibility so that I can take Hannah to the doctor if she need to go to the doctor. So that I can go to activities if she has activities planned." (E-2 [T. 27-28, Lines 25 - 4]).

The parties were married May 18, 1996, and their child, Hannah, was born on May 11, 1998 (E-3 [T. 48, Lines 22-25]).

The parties separated when Mr. Grabill left the marital residence after being served with a temporary protection order based on Ms. Grabill's claim that he threw a watch at her (E-3 [T. 18, Lines 14-19]). This happened in April of 2002 (E-4 [T. 113, Lines 1-4]).

The parties did not have a hearing on this matter because Mr. Grabill agreed to stay away after that (E-4 [T. 113, Lines 1 - 4]).

Mr. Grabill agreed for the parties' child, Hannah, to spend most of her time with Ms. Grabill because she was so young at the time (E-4 [T. 23, Lines 24-25]).

> A My prime focus has been for our daughter. I understood at the time that it would be best for Hannah because of the conflicts that me and Jessica were having to,

> to reside with Jessica primarily, but I wanted absolutely to
>
> be involved with her life . . . With the understanding that . . . in the future I would be incorporated more into Hannah's life (E-4 [T. 23, Lines 3-12].

Mr. Grabill said he now wants more time with Hannah and states his reason why as:

> "Because I love Hannah. She loves me. We care a great deal about each other and I think it's very, very important that we be able to share in, in life together" (E-4 [T. 36, Lines 2-8])

and

> ". . . also I want to be involved with her day-to-day life. I think it's very important that she have both her mother and father in her daily life and I want to share in her life. I love her. She's my heart and soul. She, she, you know, gives me all my happiness. So I, I think that it's very important for her to have both of us." (E-5 [T. 24, Lines 2 - 11]).

In regard to communication, Mr. Grabill testified that

> We can communicate. We have had difficulties at times, but we can communicate

> when it comes to Hanah . . . "we talk on the phone . . . Just today Jessica called me and told me that Hannah has a, a doctor's appointment this afternoon. We had talked last night. Hannah was sick yesterday and out of school. She's out of school today, and I told her then if, if she needs to be out of school, you know, I can help with watching her. I can take off work, you know, adjust my schedule . . . to help care for her." (E-5 [T. 36 12-25]).

Mr. Grabill testified that the parties have no conflicting religious differences and that he investigated the new church Ms. Grabill selected, but ultimately concluded there was no problem with it for Hannah. (E-5 [T 41-42, Lines 12-20]).

Mr. Grabill has provided health insurance for Ms. Grabill and the child the whole time (E-6 [T. 29, Lines 11-24]).

Mr. Grabill paid support to Ms. Grabill every month from the time he left (T. 107, Lines 7-12).

For the past few years Mr. Grabill has spent every other weekend with Hannah and Wednesday overnights (E-7 [T. 10, Lines 21-22]) and during this time he has taken Hannah to do things go to the Land of Little Horses, the petting farm, swimming lessons, field trips with the school, and assisted with homework (E-7 [T. 24, Lines 14-24]),

particularly assisting with math homework (E-7 [T. 26-27, Lines 22 - 2]). Mr. Grabill has attended parent-teacher conferences "from the beginning . . . in kindergarten and now in first grade, and volunteered at the school so he could be involved in the child's life (E-8 [T. 36, Lines 24- 11]).

Ms. Grabill acknowledged that when the child is at Mr. Grabill's house the homework does get done (E-9 [T. 114, Lines 8-10]).

Mr. Grabill gave an example of how he has helped Hannah with her homework

(E-8 [T. 26-27, Lines 6-2]).

A She did get a grade on a math test, that was about a 64 percent and the interesting thing about that is in school they practice all of their math from left to right. Their homework is left to right. On this particular test it was from top to bottom. If you look at a test that was slightly before that I believe, it was a 98 percent and it was from left to right. The one that was top to bottom was 64.

Q Okay. When you say left to right and top to bottom, what are you talking about?

A The, addition problems.
Q Okay.
A Where it's like six plus three equal and it's just going sideways.
Q Okay.
A Or six plus three on top of each other.
Q Okay.
A She, she seemed to get confused because what they had practiced was one format. When I had her at home I did the same thing with her and I noticed that she did have some difficulty differentiating between the two. So I've been working with her with the different formats to try to get her used to that math can be done different ways.

Ms. Grabill asserted that there was a time in the past when Mr. Grabill made repeated phone calls to her and had the phone records from 2002 to show this (E-9 [T. 49, Lines 17-23]).

Mr. Grabill moved to the same apartment complex that Mrs. Grabill did in order to be near their daughter (E-10 [T. 27, 7-10]) and found a job in Frederick to be near the child (E-10 [T. 27, Lines 23 - 25]).

Today Mr. Grabill lives approximately 15 to 20 miles from Ms. Grabill (E-10 [T. 27, Lines 12-13]).

Mr. Grabill wants to spend more time with his daughter so he can be involved in her day-to-day life (E-9 [T. 36, Lines 2-3]).

Ms. Grabill acknowledged that in the past few months, Hannah tripped and fell and hit her face on the curb when Ashley was present, (T. 81 Lines 1-10), that Ms. Grabill fell and broke her rib when Ashley was present, (T. 83, 13-25).

Ms. Grabill acknowledges that Mr. Grabill does love Hanah (E-10 [T. 85, Line 24]).

Ms. Grabill testified that she has no problem with Mr. Grabill having dinner visits during the week, or any problem with him calling the child every day if he wants (E-11 [T. 99, Lines 1 - 6]).

Ms. Grabill acknowledges that if she were to die she would want Mr. Grabill to be the custodian of their daughter (E-11 [T. 110 - 111, Lines 19 - 3]).

Neither party asserted that the other parent was "unfit" at any time at trial or in deposition, and, as indicated in the testimony at trial, the parties have worked together sufficiently for the last few years for Mr. Grabill to have consistent and steady time with the child

every week -- There *is* evidence in the trial transcripts of the parties' ability to work together.

Denying Petitioner Father shared physical custody when he lives about 15 minutes away from Defendant-Mother based solely on the judge's stated general belief that such would not be good for a child in first grade (saying "I just don't think that's what they need at that age") is error. This Order, based on such a broad, sweeping personal belief about what children "need at that age" is not applying the particular facts to this case violated Mr. Grabill's Fourteenth Amendment rights as have been interpreted by this Court as summarized in the *Troxel* case cited above.

Petitioner-Father loves his daughter, has always maintained a relationship with her and has always provided financial support, got a job in Frederick after retiring from the military in order to be closer to their daughter, moved closer to Appellee-Mother to be closer to their daughter (about 15-20 miles away), but still was denied joint legal and joint physical custody by the trial court in the *pendente lite* hearing.

REASONS FOR GRANTING THE WRIT

The Federal Questions

The Court of Special Appeals of Maryland, a court of last resort, has decided an important federal

question in a way that conflicts with the decisions of other state courts of last resort (namely, Kentucky and Georgia). The facts involved and fundamental rights at issue in this case call for an exercise of this Court's supervisory power.

As summarized by this Court in *Troxel v. Granville,* 530 U.S. 57, 65 (2000), this Court has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children in several previous cases.

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington* v. *Glucksberg,* 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720; see also *Reno* v. *Flores,* 507 U. S. 292, 301-302 (1993).
>
> The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years

ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535. We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g.*, *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972) ("It is

plain that the interest of a parent in the companionship, care, custody, and management of his or her children `come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.,* 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky* v. *Kramer,* 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the `liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive

> precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

The Federal Questions here are

I. Does this Court's previously published interpretation of the United States Constitution call for all States to have a rebuttable presumption of Joint Legal Custody unless there is a strong reason not to Order this, such as a finding by the court of "abuse, abandonment, or parental unfitness?"

II. Does this Court's previously published interpretation of the United States Constitution call for all States to have a rebuttable presumption of Joint Physical Custody unless there is a strong reason not to Order this, such as a finding by the court of "abuse, abandonment, or parental unfitness?"

III. Does this Court's previously published interpretation of the United States Constitution call for all States to at least have to *first consider* Joint Legal and Joint Physical Custody before considering Sole Custody?"

IV. Does the United States Constitution call for all States to have a rebuttable presumption of Joint Legal and Physical Custody unless there is a strong reason not to Order this, such as a finding by the court of "abuse, abandonment, or parental unfitness," or at least have to first consider Joint

V. Custody before considering Sole Custody, due to the Child having a fundamental right to a rebuttable presumptive right to the equal access and input of both parents?"

VI. Does the United States Constitution call for all States to have a rebuttable presumption of Joint Legal and Physical Custody unless there is a strong reason not to Order this, such as a finding by the court of "abuse, abandonment, or parental unfitness," or at least have to first consider Joint Custody before considering Sole Custody, due to each of the parents having a fundamental right to a rebuttable presumptive right to the equal access and input regarding his/her Child (i.e., not based on previously published interpretation by this Court, but which, may in the future be found by this Court)?

The State Courts Disagree

As Opposing Counsel so aptly stated in her oral argument in the Maryland Court of Special Appeals, "Joint Custody is not a starting place in Maryland." Indeed, neither Maryland case law nor the Maryland Code regarding Child Custody and Visitation has a presumption of joint custody or a requirement that joint custody must even be considered (only that it *may* be considered). However, the District of Columbia Code does, and the Court of Appeals of Georgia and Kentucky have held that the courts should consider Joint Custody first – that it should be the starting place. Based on this Court's interpretation of the United States Constitution,

as cited above, it should be a starting place in Maryland and all states.

In *In the Interest of A. R. B., a child*, 433 S.E.2d 411 (Ga. App. 1993) the court states:

> **Where both parents have demonstrated equal ability to effectively care for and nurture the child, it is in the child's best interest that a custody award be fashioned which will best encourage continuing and roughly equal contact with both parents, given the practicalities involved.** Joint physical custody, Ga. Code Ann. § 19-9-6(3), should not be automatically rejected
>
> simply because the parents live in places distant from each other. It involves time and contact. School time at one location and vacation time and alternating weekends at another, for example, would more closely equalize the time each parent shared. Contact, of course, includes other means of communication. Joint legal custody does not require proximity, and where practicable, it enables both parents'
>
> involvement in making major decisions concerning the child. Ga. Code Ann. § 19-9-6(2). In either aspect, cooperation is the key ingredient. If a mediator would ease the process initially or on a continuing basis, one should be employed.

And this court held that "A joint custody arrangement in these circumstances should have been given due consideration by the juvenile court in accordance with the State's expressed policy."

Kentucky law requires Joint Custody to be considered first: *Chalupa v. Chalupa,* 830 S.W.2d 39, (Ky. App. 1992) referred to its state code in the following holding:

> **Joint custody is also a natural progression of our no fault [**4] divorce concept (KRS 403.140(c)), recognizing that both parties may be fit parents but not compatible to be married to each other. A divorce from a spouse is not a divorce from their children, nor should custody decisions be used as a punishment. Joint custody can benefit the children, the divorced parents, and society in general by having both parents involved in the children's upbringing.** Burchell, supra. KRS 403.270 provides that a court may grant joint custody if it is in the child's best interest. The difficult and delicate nature of deciding what is in the best interest of the child **leads this Court to interpret the child's best interest as requiring a trial court to consider joint custody first, before the more traumatic sole custody. In finding a preference for joint custody is in the best interest of the child, even in a bitter divorce, the court is encouraging the parents to cooperate with**

> **each other and to stay on their best behavior. Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at any time can review joint custody and if a party is being unreasonable, modify the custody to sole custody in favor [**5] of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child's best interest, the parents' best interest, fewer court appearances and judicial economy.**
>
> KRS 403.340. See Lynch v. Lynch, Ky. App., 737 S.W.2d 184 (1987).

The District of Columbia now has a rebuttable presumption of Joint Custody:

> § 16-914. Custody of children
>
> B (2)
>
> . . . There shall be a rebuttable presumption that joint custody is in the best interest of the child or children, except in instances where a judicial officer has found by a preponderance of the evidence that an intrafamily offense as defined in D.C. Code section 16-1001(5), an instance of child abuse as defined in section 102 of the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977 (D.C. Law 2-22; D.C. Code §

> 4-1301.02), an instance of child neglect as defined in section 2 of the Child Abuse and Neglect Prevention Children's Trust Fund Act of 1993, effective October 5, 1993 (D.C. Law 10-56; D.C. Code § 4-1341.01), or where parental kidnapping as defined in D.C. Code section 16-1021 through section 16-1026 has occurred.

WHAT A REVIEW WILL PROVIDE/WHY THIS PETITION FOR CERTIORARI SHOULD BE GRANTED: A NATION-WIDE CONSISTENT POLICY OF INITIAL CONSIDERATION OF PARENTS' AND CHILDREN'S FUNDAMENTAL RIGHTS

The Kentucky and Georgia courts have held that Joint Custody first, and the D. C. Code calls for "rebuttable presumption of Joint Custody." Parents' constitutional rights should be respected no matter what state they happen to be in at the time.

Petitioner is not saying that he believes all courts should Order Joint Custody all the time, or that they should no longer have the discretion to Order what they find to be "in the best interest of the child," but for all courts to be required to *consider* Joint Custody as the place to *start* – and as the place to end, unless there is good reason to award Sole Custody, and the judges state these reasons in their Opinions. –No parent should be deprived of the joint care and custody of his or her child simply because a judge thinks that "that's not what children need at that age."

Parents should not have to live in fear that the other parent could move out at any time, for any reason, and take the children, and that he or she may then find himself or herself locked out of joint legal and/or joint physical custody – relegated to the position of occasional "visitor." In this case, the Mother stated in court that she felt like "a caged animal" when the Father did not want her to go to a bar when he was home on military leave. She then described how she pulled a loaded gun on him and when he stepped aside, she threw the gun on the bed and left. This Mother had the right to divorce this Father for any reason she wanted, but he should not have been denied due consideration for Joint Custody just because she didn't want to be married to him anymore.

Unmarried people should not have to fear that they may likely be deprived of Joint Custody without due consideration at any time. This does not just apply to Fathers. Mothers lose custody too in today's Family Law courts. Women should not have to fear that they could have a child, but that the father could get Sole Custody from them without due consideration based on the whim of a particular judge. Men should not have to fear that they could be told by a woman at any time that she's having his child but that he must stay relegated to the fringes of "visitation" for no reason other than the luck of the draw of the judges he got was a judge who "just doesn't believe in Joint Custody."

Yes, individual states have the right to determine much of their own laws. Some states have the death penalty and some states don't, but ALL states have a presumption of innocence until and unless guilt is found by a court of law. Petitioner is asking for the same thing in regard to Custody –

a presumption of Joint Custody until and unless it is proved to be in the child's best interest for Sole Custody to be awarded instead. –As is now, judges in Maryland *may* consider Joint Custody as an option, but they are under no obligation to do so.

Who among us would want to be deprived of at least being given the consideration of Joint Custody before being told the court was ordering Sole Custody and we were to be relegated to the status of "visitor" with no say in the long-term decision-making regarding health, education, and welfare of the child and with only occasional visitation time allotted for no reason other than the judge just doesn't want to give us joint custody, or "doesn't think that's what kids need at that age?" --This is what happened to Petitioner is this case.

Awarding Sole Custody to the Mother doesn't just give her authority over the Father in regard to the child, but it shuts him out from the rest of the world in regard to the child. –Since Petitioner does not have joint legal custody, he can't even get a copy of his daughter's report card from her school, and before the Mother gave her permission, could not even get his daughter's teacher to inform him of parent-teacher conferences. If she were to die, he would not even automatically get custody, but would likely have to litigate to get it – despite the fact that she said that she would want him to have custody if she died.

Where there are instances where the parties really can't agree on important things, and the court finds that one parent is more suitable than the other to make the final

decisions, then the court can simply Order Joint Legal Custody with one parent having the final say, if the parties cannot agree. –This would still leave the other parent with the status of Joint Legal Custody to use in his or her dealings with the rest of the world. The Mother in this case acknowledged that the Father paid child support every month from the time the parties separated and had a continuous relationship with the child the whole time, and that if she died, she'd want him to have custody. –What sense does it make for this Father to be shut out by the school like this just because the judge did not like joint custody? --We need a nationwide directive for courts to at least consider Joint Custody first and to state a good reason for not ordering it if they don't in order for all parents to be given due consideration of their Fourteenth Amendment Rights as summarized by this Court in the *Troxel* case cited above.

CONCLUSION

For the foregoing reasons, this Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

RUSSELL GRABILL,

Appellant

v.

JESSICA GRABILL,

Appellee

No. 2831

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition, be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

Date: December 21, 2005

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2831
September Term, 2004

RUSSELL J. GRABILL
v.
JESSICA C. GRABILL

Davis, Kenney, Meredith
JJ.
Opinion by Davis, J.

Filed September 30, 2005

On July 30, 2004, appellant, Russell Grabill, filed a complaint for joint custody of the parties' minor child in the Frederick County Circuit Court. On October 4, 2004, appellee, Jessica Grabill, filed an answer to the complaint and filed a counter-complaint for an absolute divorce. A *pendente lite* hearing was conducted on January 4, 2005, where the circuit court (Stepler, J. presiding) awarded appellee, *inter alia, pendente lite* sole legal and physical custody of the minor child. Appellant filed a timely appeal

and presents two questions for our review, which we combine and rephrase as follows:

Did the circuit court err in awarding appellee *pendente lite* sole legal and physical custody of the minor child?

We answer in the negative. Accordingly, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

Appellant and appellee were married on May 18, 1996. Their minor child, Hannah, was born on May 11, 1998. During trial, each party, at length, engaged in a bitter contest over which parent deserved custody of the minor child; the parties offered 'evidence' that each was the better parent and then asserted that the other is not fit ot raise the minor child. We will briefly address some of the 'evidence' presented to the trial court.

Appellant claims that he has a stable and flexible job with the Department of Defense. He testified that, in 2002, he left the marital home after appellee sought a temporary protective order because he allegedly threw a watch at her. At that time, although appellant wished to stay involved in their child's life, he agreed to allow Hannah to stay with appellee, because she was young and "it would be best for [our child] because of the conflicts that me and [appellee] were having." Appellant also testified that he cared greatly for his daughter and intended to become more involved in her "day to day life."

Although appellant conceded that the parties "had difficulties at time," he believed they could still communicate effectively in regard to the minor child. Additionally, he testified that he provided Hannah with health insurance, paid child support, helped with his daughter's homework, and has spent every other weekend and Wednesday nights with her. It was also noted that appellant currently resides within twenty minutes of appellee's residence.

Appellee maintains, however, that "appellee suffered from years of abuse at the hand of the appellant." She asserted that she has been the primary caretaker and has devoted herself to caring for her daughter. She testified that appellant did not know any of Hannah's friends, the name of her dentist or doctor. She further averred that upon their separation in 2002, which resulted from the protective order she sought because of an incident where appellant allegedly threw a watch at appellee, appellant agreed that appellee should be the primary caretaker of their child.

Appellant also exhibited obsessive and controlling behavior, appellee testified, which included 26 telephone calls to appellee in 21 minutes one day in 2002, and other days that included 56 calls over two days and 55, 46, and 58 calls on other days. At one point, he called her 94 times during a period of less than one month. He had also tried to restrict her from seeing her friends. Appellee further asserted that appellant is uncooperative and unable to effectively communicat4e with her about their daughter.

The circuit court ruled:

> Well, I've listened to all the testimony. My real concern is the best interest of [the child] . . . [T]he court has to consider [] what's in the best interest of [the child]. Now in a marriage, of course, people jointly decide what's going to happen in regard to their children and joint legal custody is a good concept if the parents can communicate and for many years actually was used as a compromise position. Well, I'll agree to joint legal custody. And the courts and the appellate courts have found it's not a very good compromise. Sole custody, because one parent has all the authority, is not very satisfactory to the other parent. But joint custody only works if the parents are able to speak together and arrive at joint decision.
>
> Now in this case, I think [appellee] has in fact been willing to go on with her life. I'm not so sure that [appellant] has been. I think that he loves his daughter dearly as well as I think the mother loves [the child] dearly. And I don't have any concerns about how she's taken care of in either household. But you have to look at what is in the best interest of [the child]. She's apparently in her first year of school . . . But what I'm trying to say, the best of all worlds would be if parents could have joint legal custody, but it's not in the best interest of a child. If joint legal custody is granted then all the

parents do is argue about what they should do because I don't care how old the child is, ah, they're aware that there's tension and argument between their parents . . . And little kids can't always understand exactly what's going on, but they can feel the tension. I mean they can feel it. They might not be able to vocalize but it affects them.

So we found that joint legal custody is not a good compromise position. If in fact it's going to expose the child to uncertainty, uncertainty because the decision can't be made because there's no agreement on it, uncertainty whether she should wear pants or dresses. Now I just, you know, little things like that or who her doctor should be. If all the parents are going to do is have arguments about what is in the best interest and unable to arrive at joint decisions then it's not a good idea because there's no certainty, there's no one to make a decision when a decision has to be made, and if you have to run back to the court every time, that affects the children too. So I think, ah, although, I very much enjoy granting legal custody when I can see that the parents are trying to cooperate, and quite truthfully, most parents can cooperate. But they can only cooperate if they set aside whatever personal differences there are with their spouse. And then their problems seem to disappear. Because there is some controlling behavior and some obsessive behavior that has been demonstrated by [appellant], but I think that's as a result of him not being able to let go

of his wife. So maybe in the future you can have joint legal custody, but I'm not going to do it now because it's just not a good alternative.

Mom has been the primary caretaker and I'm gonna grant sole legal custody to Mom . . . [I] think where a child is to, to stay has to be considered in light of how old that child is. Ah, in other words, I don't think it's a good idea to put a first grader fifty percent in one home and fifty percent in another home. I just don't think that that's what they need at that age. Now parents have to be flexible. Ah, if both of you can set aside your differences and say well, the only thing I'm concerned about is [the child] and don't let any of this other stuff interfere with it, you might be able to make joint decisions. But I don't think it's been demonstrated.

The access will be every other weekend as you have been doing and every Wednesday. I'm not gonna do overnights on Wednesday. Now there may be a time when you can do overnights if the child's a different age, but right now when she has such an early bedtime and she probably should go to bed early as she does, ah, I don't think overnights are a good idea. Certainly split any vacation she has from school, alternate holidays, ah, ah, except for the first and last week of summer, parents, if they're going to be home and can take vacation, ah, should be able to each spend time with the child when they don't have any schoolwork to consider. From what I've

heard of [appellee's] testimony, she doesn't seem reluctant to offer visitation. It's just that I think that she feels that what's being offered is perhaps an effort at reconciliation which she's not willing to do, and that's, I think she's willing – and there's no question, mother, mother and father should be a part of [the child's] life. She shouldn't be deprived of either of you. So I don't know what each of you need to do to get on with your life, but you need to do whatever it is. It's obvious now that Mom has more time, in fact has just devoted herself as far as her work is concerned to provide access to [the child].

[I]f [appellee] is gonnna have the decision-making, I would hope she would consult with [appellant] about it. But then there has to be an acceptance by [appellant] that in fact she's gonna be the one that makes the decision. If everybody, if both [appellant and appellee] can respect each other's boundaries, which I seem to be hearing [appellee] say that there's just no respect for boundaries here, if each would respect their own space, ah, accept the fact that they're not gonna be married and they have to do their best in order to provide for [the child], maybe there's some hope for them working in the future . . . .

The trial judge then discussed the visitation schedule and computed child support, which are not being appealed in this case. A *Pendente Lite* Order followed, in which the trial

judge directed that appellee "is hereby granted sole legal and primary physical *Pendente Lite* custody of the parties' minor child"; she thereafter delineated the visitation schedule and child support.

LEGAL ANALYSIS

Appellant contends that the circuit court erred in awarding appellee physical and legal custody of their minor child. We disagree.

A circuit court's custody determination will not be disturbed unless its factual findings were clearly erroneous or its ultimate conclusion constitutes a "clear abuse of discretion." *In re Caya B.*, 153 Md. App. 63, 74 (2003). *See* Maryland Rule 8-131(c). "It is not enough that the appellate court find that the chancellor was merely mistaken in order to set aside the custody award. Rather, [we] must determine that the judicial discretion of the chancellor was clearly abused." *McCarty v. McCarty*, 147 Md. App. 268, 274 (2002) (quoting *Ross v. Hoffman*, 280 Md. 172, 186) (1977)). We have observed that of particular importance in custody cases, "is the trial court's opportunity to observe the demeanor and the credibility of the parties and witnesses." *Id.* at 273 (quoting *Barton v. Hirshberg*, 137 Md. App. 1, 24-25 (2001)).

We review the circuit court's determination "in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination it is not clearly erroneous." *Ross*, 280 Md. at

186. Therefore, a conclusion that the circuit court was clearly erroneous in its findings is not warranted simply because appellant believes the circuit court should have made factual findings that comported with his view.

In all custody cases, of "paramount concern" is the best interest of the child. *Taylor v. Taylor*, 306 Md. 290, 303 (1986). The circuit court should consider numerous factors when determining what is in the child's best interest, including, *inter alia*, the fitness of the parents, preferences of the child, the child's age, health, and past relationship with the parent, residences of the parents, character and reputation of the parents, the parents' wishes, and what influence they will have on the minor child. *Flynn v. May*, 157 Md. App. 389, 409 (2004); see *Evans v. Wilson*, 382 Md. 614, 637 (2004).

Custody, however, embraces both legal and physical custody. The Court of Appeals distinguished the two concepts:

> Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare. Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other. Physical custody, on the other hand, means the right and obligation to provide a home for the child and to make the

> day-to-day decisions required during the time the child is actually with the parent having such custody. Joint physical custody is in reality "shared" or "divided" custody.

(Citations and footnote omitted). *Taylor*, 306 Md. At 296-97. See *Shenk v. Shenk*, 159 Md. App. 548, 558-59 (2004); *McCarty*, 147 Md. App. at 271.

In considering joint custody, bearing in mind that the best interest of the child "is not considered as one of many factors, but as the objective to which virtually all other factors speak," the "major factors that should be considered" include the capacity of the parents to communicate and to achieve joint decisions concerning the child's welfare, willingness of the parents to share custody, the fitness of the parents and the relationship between each parent and the child, the child's preference and age, potential for disruption in the child's social and school life, geographic proximity of the parents' houses, demands of parental employment and their respective financial status, sincerity of the parent's request, and other factors. *Taylor*, 30 Md. At 303-11.

The Court of Appeals has made clear that the most important factor is the capacity of the parents to communicate and reach joint decisions. *Id.* at 304. "With few exceptions, courts and commentators agree that joint custody is a viable option only for parents who are able and willing to cooperate with one another in making decisions for their child." *Id.* This is demonstrated by "mature conduct on the part of the parents evidencing and ability to effectively communicate with teach other concerning the

best interest of the child." *Id.* Further explaining this concept, the Court opined that "even in the absence of bitterness or inability to communicate, if the evidence discloses the parents do not share parenting values, and each insists on adhering to irreconcilable theories of child-rearing, joint legal custody is not appropriate" as there must be "respect for one another as parents." *Id.* at 305-06. See *McCarty*, 147 Md. App. at 306 (generally, a trial judge should not grant joint custody when parents will not willingly assume it). Of course, the trial judge must consider "all other circumstances that reasonably relate to the issue." *Taylor*, 306 Md. At 311.

In this case, the trial judge found it to be in the best interest of the minor child to live with appellee. She also found that appellee should maintain legal custody over the child. Throughout the trial, both parties offered conflicting testimony as to who was the better parent, how they communicated about issues concerning their daughter, their relationships with the child, how the custody would disrupt the child's social and school life, each parent's geographic proximity, demands of their employment, and each parent's overall views of the other. The circuit court also expressed a view with respect to requiring a child of tender years to divide her time between two households.[1] Unfortunately for

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[1] In rendering her oral opinion, the trial judge made the following remarks:

> [I] think where a child is to, to stay has to be considered in light of how old that child is. Ah, in other words, I don't think it's a good idea to put a first grader fifty percent in one home and fifty percent in another home. I just don't think that that 's what they need at that age.

the circuit court, little 'evidence' was actually offered to help guide its decision beyond that of the bickering parties. Therefore, the circuit court was constrained to render a decision with what little 'facts' it had before it.

The circuit court need not articulate every piece of evidence it relied upon to render its conclusion and in this case, it appropriately found that it was in the child's best

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During oral argument before the panel of this court, appellant's counsel cited this statement by the trial judge in support of the argument that the court had not accorded proper weight to the factors which should be considered in a determination of whether joint physical and legal custody is appropriate in a given case as iterated in *Taylor* and other authorities. Had the trial judge made an unequivocal statement that, under no circumstances, should joint physical or legal custody be granted in a case involving a first grader, irrespective of an evaluation of the other factors, we would be constrained to consider requiring a reassessment, applying the proper standard. Because the record in this case leads ineluctably to the conclusion that the parents of young Hannah are incapable of communicating rationally with only Hannah's best interests as their ultimate goal, and because the trial court so found, the court's statement, while troubling, does not indicate that it would never grant joint physical and legal custody where a first grader is involved, but rather that the court did not believe "it's a good idea." It is preferable, however, in our view, to avoid statements indicating a predisposition skewed to a particular result, where the law clearly requires application of factors enumerated in prior decisions to the facts of the case.

interest to grant *pendente lite* legal and physical custody to appellee. Our review of the record reveals that there was evidence to support the circuit court's conclusion.

Although in the case appellant does not agree with the circuit court's factual findings and ultimate determination, based on the evidence presented and deferring to the circuit court's ability to judge the witnesses' credibility, we hold that the circuit court's findings were not clearly erroneous, nor its conclusion a clear abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX C

MANDATE

Court of Special Appeals

No. 02831, September Term, 2004

Russell J. Grabill

vs.

Jessica C. Grabill

JUDGMENT: September 30, 2005; Judgment of the Circuit court for Frederick County affirmed. Costs to be paid by appellant.

Unreported Opinion by Davis, J.

October 17, 2005; Mandate issued.

From the circuit Court: for FREDERICK COUNTY

00000C041771

STATEMENT OF COSTS:

Appellant(s):

Lower Court costs -	60.00
Steno Costs of Appellant -	525.00
Filing Fee of Appellant -	50.00
Brief of Appellant-	54.00
Reply of Appellant-	50.40

Appellee(s):

Brief of Appellee-	252.00

APPENDIX D

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

RUSSELL GRABILL,

Plaintiff

v.

JESSICA GRABILL,

Defendant

Case No. C-04-1771

PENDENTE LITE ORDER

The Plaintiff having filed a Complaint for custody, the Defendant having filed a Counter-Complaint for Absolute divorce, this matter having been set for hearing on all *Pendente Lite* issues, and testimony having been taken, it is therefore, this 3 day of February, 2005, by the circuit Court for Frederick County, Maryland,

ORDERED, that the Defendant, JESSICA C. GRABILL, is hereby granted sole legal and primary physical *Pendente Lite* custody of the parties' minor child, namely Hannah Kelsey Grabill, born May 11, 1998; and it is further

ORDERED, that the Plaintiff, RUSSELL J. GRABILL, shall have visitation with the minor child on alternating weekends from 6:00 p.m. Fridays through 8:00 p.m. Sunday evenings; and it is further

ORDERED, that the Plaintiff, RUSSELL J. GRABILL, shall have visitation with the minor child on alternating weekends from 6:00 p.m. until 7:00 p.m. when she shall be returned to her mother; and it is further

ORDERED, that the parties alternate holidays as follows: the Plaintiff, RUSSELL J. GRABILL, shall have the minor child in all odd-numbered years from 6:00 p.m. New Years Eve through New Years Day at 6:00 p.m., Memorial Day, Labor Day, Thanksgiving Day until 7:00 p.m.; Christmas Day at 1:00 p.m. through December 26 at 6:00 p.m. (except for 2005 where he shall be entitled to the child Christmas Day at 6:00 p.m. until December 26 at 6:00 p.m., since he had the child the entire Christmas holiday in 2004). The Plaintiff, RUSSELL J. GRABILL, further shall have the minor child in all even-numbered years on Easter Day; Independence Day; Thanksgiving Day at 7:00 p.m. until the day after Thanksgiving Day at 6:00 p.m.; Christmas Eve Day at 6:00 p.m. until Christmas Day at 1:00 p.m.; and it is further

ORDERED, that each party should have three (3) weeks, no more than two (2) consecutive, with the child during the summer vacation, but the child shall be with the Defendant, JESSICA C. GRABILL, the week after school recesses and the week prior to school recommencing; and it is further

ORDERED, that the Plaintiff, RUSSELL J. GRABILL, shall pay unto the Defendant, JESSICA C. GRABILL, the sum of Eight Hundred Twenty –Two dollars ($822.00) per month as and for the current support of the minor child, effective and retroactive to August 2004; and it is further

ORDERED, that the arrears, effective December 31, 2004, are Two Thousand One Hundred Ten Dollars ($2,110.00); and it is further

ORDERED, that the Plaintiff, RUSSELL J. GRABILL, shall pay an additional Eighty-Two and 20/100 Dollars (482.20) per month towards the arrears until such time as the arrears are satisfied; and it is further

ORDERED, that the Plaintiff, RUSSELL J. GRABILL, shall pay the total sum of Nine Hundred and 20/100 Dollars ($904.20) per month directly to the Defendant, JESSICA C. GRABILL, beginning January 1, 2005, including the arrears payment, until such time as an Earnings Withholding Order is entered and thereafter by Earnings Withholding Order; and it is further

ORDERED, that this Order constitutes an immediate and continuing Withholding order on all earnings due to the Plaintiff on and after the date of this Order, subject to the conditions set forth in Maryland Code Ann. Fam. Law Art., Section 10-120 et. Seq.; and it is further

ORDERED, that a Wage Withholding and/or health insurance coverage order be immediately served on the Plaintiff, RUSSELL J. GRABILL's employer; and it is further

ORDERED, that the Plaintiff, RUSSELL J. GRABILL shall notify the Court within ten (10) days of any change of address or employment so long as this support order is in effect, and failure to comply will subject him to pay a penalty not t exceed $250.00 and may result in his not receiving notice of proceedings for earnings withholdings; and it is further

ORDERED, that the Court specifically reserves on the issue of attorney's fees.

Mary Ann Stepler

Judge, circuit Court for Frederick County, Maryland

Filed by the Court on February 11, 2005

APPENDIX E

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

RUSSELL GRABILL,

Plaintiff

v.

JESSICA GRABILL,

Defendant

Case No. C-04-1771

ORDER

Upon consideration of Plaintiff's Motion to Alter or Amend Judgment and Defendant's Motion to Strike Plaintiff's Motion to Alter or Amend Judgment, it is this 4th day of February, 2005, by the Circuit Court for Frederick County, Maryland,

ORDERED, that the Motion to Alter or Amend Judgment is hereby

DENIED.

/s/ Mary Ann Stepler
Mary Ann Stepler
Judge

Filed by the Court on February 11, 2005